Supreme Court of the United States

OCTOBER TERM, 1950

No. 429

BRIAN O. SPARKS, BRANT PHILLIPS, JOHN SCOTT, ROY MOORE, WENDELL L. DANIELSON, FRANK T. HOTOPH, JOHN J. TAYLOR,

Petitioners,

vs.

CIVIL AERONAUTICS BOARD,

Respondent,

PAN AMERICAN AIRWAYS, AMERICAN OVERSEAS AIRLINES, AMERICAN AIRLINES,

Interveners.

BRIEF OF PAN AMERICAN WORLD AIRWAYS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief is submitted by Pan American World Airways, Inc. (hereinafter referred to as "Pan American"), in opposition to the petition of certain former employees of American Overseas Airlines, Inc. (hereinafter referred to as "AOA") for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit (Judges Swan, Clark and Frank).

By this judgment the Court of Appeals dismissed, for want of jurisdiction, appeals taken by petitioners and by Trans World Airlines, Inc. (hereinafter referred to as "Trans World"), from an order of the Civil Aeronautics Board authorizing the transfer to Pan American of AOA's certificate to engage in international air transportation. The Board's order was made in accordance with a direction of the President of the United States under Section 801 of the Civil Aeronautics Act of 1938, 49 U.S.C. 601. The Court of Appeals held that the President and the Board had acted within their legal powers and that consequently the Board's order was not reviewable under the rule in *Chicago & Southern Airlines* v. *Waterman S.S. Corp.*, 333 U. S. 103 (1948).

The judgment was entered on August 14, 1950. The opinion (by Judge Swan) is reported in 184 F. (2d) 66 (1950).

Statement of the Case

The order of which review by the Court of Appeals was sought was entered in a proceeding before the Civil Aeronautics Board called the *North Atlantic Route Transfer Case,* Docket No. 3589 *et al.* (R. 142-155).*

This proceeding arose out of applications filed December 15, 1948, for such authorizations under the Civil Aeronautics Act as were required to carry out an agreement between Pan American and AOA for the trans-

* For convenience, the abbreviations utilized in this brief in referring to the record are the same as those set forth in the footnote on page 6 of the Petition. These are as follows: P for Petitioners' Petition for Judicial Review; PR for Petitioners' Petition for Rehearing; A for Affidavits of H. J. Friendly *et al;* R for the portion of the record printed pursuant to stipulation; RB for the unprinted record before the Board. Other original documents filed in the Court below are referred to as OR.

fer to Pan American of all the property, assets and business of AOA, including AOA's temporary certificate of public convenience and necessity (expiring in July 1952) to engage in the air transportation of persons, property and mail between co-terminal points in the United States and various points in Europe. Pan American itself already possessed both permanent and temporary authorization to operate between the United States and Europe, including the major points authorized to be served by AOA.

Trans World, the third American-flag certificated transatlantic airline, intervened in opposition. Trans World was not satisfied to have the Board and the President consider the case on a basis where the only action that could be taken would be either an approval or a disapproval of the transfer of AOA's certificate to Pan American. It moved that the proceeding be broadened so as to permit the Board and the President to re-arrange the routes of Pan American and Trans World in the event that Pan American was permitted to acquire AOA (A 5-8 (Friendly affidavit, paras. 5 and 6)). A somewhat similar motion was filed by "Public Counsel", staff attorneys who, under the Board's practice, have virtually the same participation as a party in interest (A 8-10 (Friendly affidavit, para. 7)).

By Order Serial No. E 2512, dated March 1, 1949, the Board broadened the scope of the proceeding substantially as Trans World and Public Counsel had requested (R. 155-158). It instituted on its own motion a further proceeding, to be consolidated with the proceedings initiated on December 15, 1948, to determine whether if the transfer of AOA's certificate to Pan American was approved, the certificates of the surviving carriers "should be altered,

amended, or modified, in whole or in part" (R. 157-158). It did this upon the basis of a finding (R. 157):

> "that if said proposal is to be approved, the President and the Board should be able to alter, amend and modify the route patterns of the American-flag carriers across the North Atlantic, American Overseas, Pan American and TWA, as may be in the public interest, and should not be limited merely to action on the proposal submitted by Pan American and American Overseas".

By another order, also dated March 1, 1949 (Order Serial No. E 2514), the Board granted administrative intervention to Sparks, *et al.*, the petitioners herein, seven employees of AOA who asserted that they represented a larger group (RB 6930-32).

Subsequently, on May 19, 1949, the Board entered a further order (Serial No. E 2833) clarifying the scope of the broadened proceeding (R. 158-165).

The proceeding went to hearing on the issues as thus broadened. Extensive evidence was presented relating to the proposed acquisition and to the possible changes in the routes of Pan American and Trans World in the event that Pan American's acquisition of the certificate and assets of AOA was approved (A 12-18 (Friendly affidavit, paras. 9-14)).

The Board initially determined, by a divided vote, to disapprove the proposed acquisition. In accordance with Section 801 of the Act, the Board submitted this decision to the President for his approval "before publication thereof". Although the President approved this decision on June 29, 1950, he recalled his approval on the following day before publication of the decision and directed that the proposed order be returned to him. This was done. Upon

further consideration, on July 10, 1950, the President instructed the Board to approve the transfer of AOA's certificate to Pan American and to make certain changes in the routes of Pan American and Trans World, with a view to providing American-flag competition to the principal traffic points in Europe. The President's instructions to the Board were as follows:

"July 10, 1950

"My dear Mr. Ryan:

I have considered the letters from you and the other Board members in response to my request of June 30, 1950, in the North Atlantic Route Transfer Case.

My objective is to accomplish a route pattern in which our nation may have the benefit of competition to the principal traffic points in Europe, and to avoid a monopoly on the part of either of the United States carriers.

It is apparent that, as traffic points, London, Paris, Rome, and for the time being Frankfurt are the leading European cities. Therefore I desire that both remaining carriers be authorized to serve each of these points. In the case of Rome, which one of the carriers now serves both on its Shannon and its Lisbon routes, the other carrier should be similarly authorized. As to Frankfurt which is a principal air traffic point during and principally because of the American occupation of Germany, the TWA is to serve Frankfurt until the Board shall find that such service is no longer required in the interests of the American occupation of Germany.

This adjustment should result in the fullest accomplishment of the broad national objectives which, especially at this critical time, should govern the development of United States air transportation and will provide for vigorous competitive growth by our air lines.

It is most important that this matter be disposed of in the present proceeding without further delay in order that the carriers concerned may immediately go forward with plans for their needed further development.

Therefore, I have decided to approve the sale of American Overseas Airlines with the route adjustments set forth above. Please submit an order at once.

Very sincerely yours,

(Sgd) HARRY S. TRUMAN

Mr. Oswald Ryan
Acting Chairman
Civil Aeronautics Board
Washington 25, D. C."

The Board thereupon immediately prepared, adopted and submitted to the President an order carrying out his instructions. This was approved by the President on July 11, 1950. By this order, Serial No. E 4410 (R. 142-155), the Board and the President approved the acquisition by Pan American of the assets and certificate of AOA, conditioned upon certain route changes whereby Trans World was authorized to serve London and Frankfurt, points which had been previously served by both AOA and Pan American, and Pan American was authorized to serve Paris and Rome, points at which Trans World had previously held a monopoly of air service under the American flag. The order also contained conditions relating to protection of the rights of employees affected by the acquisition, and several supplemental orders on this subject have been issued (Order Serial No. E 4634, issued September 22, 1950; Order Serial No. E 4659, issued September 25, 1950).

On July 21, 1950, Trans World and the petitioners herein filed petitions in the United States Court of Appeals

for the Second Circuit to review Order Serial No. E 4410 and moved for a stay of the order pending determination of the appeals. Trans World named Pan American, AOA and American Airlines, owner of a majority of AOA's stock, as respondents along with the Board. The petitioners named only the Board as a respondent, but Pan American, AOA and American Airlines applied for and were granted the right to intervene.

Although the two appeals were not consolidated, oral argument was held on both before a full bench consisting of Judges Swan, Clark and Frank on July 26, 1950. The respondents and intervenors contended that the granting of a stay would be adverse to the public interest and would irreparably injure Pan American, AOA and American Airlines since, under the banking arrangements which Pan American had made, the transfer of AOA's assets and certificate to Pan American had to be carried out by the end of September, 1950. They contended also that the appeals were without substance. In this connection the merits were fully argued by both sides.

On August 14, 1950, the Court of Appeals rendered its decision. It dismissed the petitions of both Trans World and of the present petitioners for want of jurisdiction. It held that the President had acted within the authority granted him by Section 801 and that as a result the order of July 10, 1950 was immune from judicial review, under the rule laid down by this Court in *Chicago & Southern Airlines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103 (1948) and, previously, by the Court of Appeals itself in *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810 (1941). The Court said (R 101-102):

> "For the foregoing reasons we think that the President and the Board acted within their legal powers in making the order of July 10th. If so,

> the court is without jurisdiction to review that order and the petitions for review will have to be dismissed when brought on for hearing. The issue has been thoroughly and capably argued on these motions. Nothing will be gained by postponing decision until final hearing. And an immediate decision on this issue may accelerate the parties' access to the Supreme Court, if they are disposed to seek it. Accordingly, the motions for a stay and other interlocutory relief are denied and the petitions for review are dismissed for lack of jurisdiction."

Petitioners did not avail themselves of the Court's suggestion that they promptly apply for "access" to this Court if they were disposed to do so. Instead, on August 29, 1950, the last day on which such a petition could be filed, they filed a petition for reconsideration and rehearing by the Court of Appeals. Petitioners did not then renew their request for a stay nor have they since asked either the Court of Appeals or this Court for a stay. The petition for reconsideration was denied by the Court of Appeals, without opinion, on September 6, 1950.

Pan American and AOA proceeded to carry out on September 25, 1950, as had been publicly announced some weeks in advance, the transaction approved by the President and the Board. At the close of business on that day Pan American paid AOA the purchase price of $17,450,000 and took over AOA's fleet of 19 airplanes, AOA's ground equipment, located in the United States and in 12 foreign countries, and most of its 1200 employees. At about the same time, the United States, acting under various bilateral agreements with foreign governments, designated Trans World (which had announced its acceptance of the Court of Appeals' decision) and Pan American to operate the new services authorized for them by the

order of July 10, 1950. In consequence, Trans World is now serving London and Frankfurt, and Pan American Paris and Rome. The purchase price received by AOA for its assets has been almost fully distributed to its stockholders.

The petition for a writ of certiorari now before this Court was filed on December 4, 1950, the last day on which such a petition could be filed.

Summary of Argument

Petitioners are met at the outset by the fact that they do not have the "substantial interest" in the order of the Board which is a prerequisite to their obtaining judicial review of that order. Section 1006(a) of the Civil Aeronautics Act, 49 U.S.C. 646(a), under which the petition for review was brought, extends this right only to persons having a "substantial interest". Petitioners sought to justify their intervention before the Board on their desire to preserve AOA as an independent institution having a special "way of life" (RB 7038-39), and on the possibility that they might be in a position to bid for the property or for American Airlines' stock interest if American was determined on a sale (RB 7040-42). Neither of these constitutes the "substantial interest" which the Act requires. Petitioners are not seeking to vindicate their interest in protection of employment, seniority and the like; that task was assumed by employee organizations, and petitioners do not, and are not in a position to, complain of what was done by the Board in that regard. There is no proof that any of the seven petitioners are themselves stockholders of AOA; therefore, even if they have in fact authority from other employees who do own a small amount of AOA stock, the petition cannot be sustained

as a "class suit" by stockholders since petitioners are not members of the class. Moreover, these stockholders had no interest as such "distinct from that of the corporation", *American Power & Light Co.* v. *Securities & Exchange Commission,* 325 U. S. 385, 388 (1945), and petitioners do not criticize the fairness of the terms of sale. This bar to the granting of the petition will be dealt with in Point I below.

In Point II we shall show that there is not the slightest merit to the contention, upon which petitioners place their major reliance, that the Court of Appeals erred in holding that the President has the same authority over a Board order *disapproving* a transfer of a certificate to engage in international air transportation that he admittedly has over a Board order *approving* such a transfer. The reading which the Court of Appeals gave to Section 801 is the only reading consistent with its language, its history, its evident purpose, the judicial decisions construing it, the administrative practice under it, and common sense.

Finally, in Point III, we shall examine petitioners' other specifications of error and will show that there is neither merit nor general importance to any of them.

ARGUMENT

I

The writ should be denied because petitioners do not have a "substantial interest" in the order of the Board sought to be reviewed.

Section 1006 (a) of the Civil Aeronautics Act, 49 U. S. C. 646 (a) provides that an order of the Board shall be subject to review on petition "by any person disclosing a substantial interest in such order."

This language sets up a much stricter test of standing to sue than applies under statutes giving a right to judicial review to any "person aggrieved", although we do not believe petitioners would qualify even under statutes of the latter type. It was under statutes using the "person aggrieved" phraseology that persons not having a "substantial interest" were allowed judicial review in the decisions cited on page 30 of petitioners' brief, and in *American Power & Light Co.* v. *Securities and Exchange Commission, supra.* The difference in the rule under the two types of statutes was explained by this Court in the *American Power* case (325 U. S. 385, 390-91), where it said:

> "This court has not allowed the usual criteria of standing to sue to deny persons who, in analogous cases under that doctrine, would ordinarily not be permitted to invoke court review, the benefit of such review under statutes embodying *the same language* as §24(a) [citing *Interstate Commerce Commission* v. *Oregon-Washington R. & N. Co.,* 288 U. S. 14; *Federal Communications Comm.* v. *Sanders Bros. Radio Station,* 309 U. S. 470; and comparing *Singer & Sons* v. *Union Pacific Ry. Co.,* 311 U. S. 295]. The same is true of the lower Federal courts [citing *Associated Industries* v. *Ickes,* 134 F. (2d) 694]. In these instances *the extension of the privilege to persons aggrieved* was held to extend it to those not technically parties, and, therefore, not entitled, without the statutory provision, to initiate litigation in a court." (Emphasis supplied.)

In contrast, under statutes containing the "substantial interest" language, a person seeking review of action of a federal agency must show "that such conduct or threatened conduct invades or will invade a private substantive legally protected interest of the plaintiff citizen; such invaded interest must be either of a 'recognized' character,

at 'common law' or a substantive private legally protected interest created by statute." *Associated Industries* v. *Ickes,* 134 F. (2d) 694, 700 (2nd Cir. 1943). In other words, the "substantial interest" required is a definite legal right which has been or will be violated by the order in question. *Singer & Sons* v. *Union Pacific R. R. Co.,* 311 U. S. 295, 304 (1940); *Western Pacific California R. R. Co.* v. *Southern Pacific Co.,* 284 U. S. 47, 51 (1931).

The granting of administrative intervention by the Board does not, of course, establish the requisite "substantial interest" on the part of the petitioners. Section 302.6 of the Board's Procedural Regulations states:

> "* * * Interventions provided in this section are for administrative purposes, and no decision to grant leave to intervene shall be deemed to constitute a finding or determination that the intervening party has such a substantial interest in the order that is to be entered in that proceeding as will entitle it to demand court review of such order."

Pittsburgh & West Virginia Ry. v. *United States,* 281 U. S. 479 (1930), held that the fact that a party had been allowed to intervene before the Interstate Commerce Commission did not entitle that party to institute a suit to set aside the Commission's order.

Before the Board, petitioners rested their claim to intervene on two grounds.

The first was certain emotional rights based on [RB 7039]

> "years of devotion to an institution known as AOA, which is now being threatened with absorption by a wholly different institution, with different management, different objectives and different conceptions, it is believed, of the public interest."

Clearly, however, the pangs that petitioners may have suffered as a result of the sale of AOA and the substitution of another employer do not give them the requisite "substantial interest".

The second ground was an allegation that "they represent capital anxious to enter the business of international air transportation" by purchasing AOA or the interest of American Airlines, the principal stockholder of AOA (RB 7040). However, petitioners' presentation before the Board made it evident that they neither had, nor ever had had, any reasonable expectation of securing the amount of capital necessary to that end [RB 2765-68, 2772-76, 2781-88, 2794-98, 2805-07, 2823-24], and if the evidence had been otherwise, the status of a would-be purchaser likewise would not meet the statutory test.

Petitioners' brief suggests (pp. 30-31) two other bases on which petitioners now seek to rely.

The first of these is their rights to protection as employees of AOA. However, in their petition for leave to intervene before the Board, petitioners specifically disclaimed relying upon any threat which the sale might involve to their continued employment. This, they correctly stated (RB 7039), "will be protected, it is believed, by the intervention of the organizations representing these various classes of employees." Six labor unions did intervene and present evidence as to the protection of the interests of employees who might be affected by the proposed transaction; petitioners made not the slightest presentation on the subject. The order of which review is sought has since been amended and supplemented by further orders of the Board dealing in great detail with the protection of the interests of the employees of AOA. Petitioners have not evidenced any concern with these orders, have not sought to have them reviewed by the Court of Appeals, and

do not complain of them now. No one disputes that under *United States* v. *Lowden,* 308 U. S. 325 (1939), cited by petitioners at page 30 of their brief, protection of the interests of employees of an air carrier party to a merger could properly be considered by the Board as an element in the public interest. But it by no means follows that this confers upon employees of a selling carrier a "substantial interest" in questions wholly unrelated to employee protection—particularly when the latter had been disclaimed as a basis for administrative intervention by the employees and no evidence on the subject had been presented by them.

The second ground now suggested by petitioners is that (p. 31) they "were minority stockholders of AOA". But here petitioners face a number of obstacles. There is no proof that any of the seven employees who filed the petition for review owns or ever owned any stock of AOA. The record before the Board contained no such proof, and an affidavit before the Court below showed that none of the petitioners was a stockholder of record of AOA at the time of the appeal (OR 113, Affidavit of E. S. Travers). To be sure there was evidence that, among the other AOA employees alleged to be represented by the seven petitioners, there were some who owned an aggregate of over 1,000 shares—out of a total of 1,750,000 shares outstanding. Whether or not petitioners can be considered representatives of this larger group for some other purpose, it is clear that, in the absence of stock ownership by petitioners, they cannot represent any interest of these other employees as stockholders. It is elementary that the plaintiff in a class action must be a member of the class sought to be represented. *Smith* v. *Swomstedt,* 16 How. 288 (1853); *Hansberry* v. *Lee,* 311 U. S. 32 (1940); *West* v. *Randall,* 29 Fed. Cas. No. 17424,

p. 718 (C.C.R.I., 1820); cf. Rule 23 of the Rules of Civil Procedure for the District Courts of the United States; *Pelelas* v. *Caterpillar Tractor Co.*, 30 F. Supp. 173 (D.C. S.D. Ill. 1939).

Moreover, this Court has held, in cases concerning orders of the Interstate Commerce Commission, that a stockholder interest *per se* is not sufficient to give a party standing to seek judicial review. Thus, *Pittsburgh & West Virginia Ry.* v. *United States, supra,* held that the Railway Company, as a minority stockholder of another company which had procured Commission authorization for certain business transactions, could not sue to set aside the Commission order, since (281 U. S. at 487):

> "The injury feared is the indirect harm which may result to every stockholder from harm to the corporation. Such stockholder's interest is clearly insufficient to give the Pittsburgh a standing independently to institute suit to annul this order."

See also *Schenley Distillers Corp.* v. *United States,* 326 U. S. 432 (1946). Nothing in *American Power & Light Co.* v. *Securities & Exchange Commission,* 325 U. S. 385 (1945) is to the contrary since that case was decided under a "person aggrieved" statute and merely held that a stockholder "having a substantial financial or economic interest distinct from that of the corporation which is directly and adversely affected by an order of the Commission", might have standing to appeal from an order affecting the corporation (p. 388). The holders of 1,000 shares of AOA stock whom petitioners claim to represent had no "substantial financial or economic interest distinct from that of the corporation". Indeed, petitioners did not and do not claim that any economic interest of their alleged principals as stockholders was adversely affected

by the order of the Board at all; on the contrary, petitioners conceded the fairness of the price which AOA was to receive (RB 8696).

The Court below was not required to consider petitioners' lack of the "substantial interest" required for judicial review, since Trans World, which was then also an appellant, had such an interest. Here, however, it is clear that if a writ of certiorari were issued, it would ultimately have to be dismissed on this ground. Petitioners have no "private substantive legally protected interest" which they are seeking to vindicate. Their concern with the nation's international air policy is not the "substantial interest" which the Act requires.

II

The holding of the Court of Appeals that Section 801 of the Civil Aeronautics Act gives the President the same authority over a Board order disapproving a transfer of a certificate to engage in international air transportation that he has over a Board order approving such a transfer was plainly right.

Petitioners concede there can be no judicial review of the order of the Board and the President if Section 801 of the Civil Aeronautics Act required the Board to submit to the President for approval its initial decision proposing to deny the transfer. That question was put to rest by *Chicago and Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103 (1948). Petitioners contend, however, that although Section 801 requires the Board to obtain Presidential approval if the Board decides to *grant* a transfer of an international certificate, Section 801 does not require such approval if the Board proposes to *deny* the transfer.

The Court below correctly overruled this contention as contrary to the plain meaning of Section 801, to the purpose behind it, to the interpretation placed upon it by the courts, to the administrative practice, to the views expressed or acquiesced in by all parties to this very case until the moment when the President exerted his authority in a manner displeasing to some of them—and to common sense.

The Civil Aeronautics Act is, for the most part, a typical common-carrier regulatory statute, largely modelled upon the Motor Carrier Act. Section 801, however, represents a significant departure from the general regulatory pattern. It provides, in pertinent part, as follows:

> "The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Authority before hearing thereon, and all decisions thereon by the Authority shall be submitted to the President before publication thereof * * *".

In *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103 (1948), this Court described the extent and significance of this departure as follows:

> "But when a foreign carrier seeks to engage in public carriage over the territory or waters of this country, or any carrier seeks the sponsorship of this Government to engage in overseas or foreign air transportation, Congress has completely in-

> verted the usual administrative process. Instead of acting independently of executive control, the agency is then subordinated to it. Instead of its order serving as a final disposition of the application, its force is exhausted when it serves as a recommendation to the President. Instead of being handed down to the parties as the conclusion of the administrative process, it must be submitted to the President, before publication even can take place. Nor is the President's control of the ultimate decision a mere right of veto. *It is not alone issuance of such authorizations that are subject to his approval, but denial, transfer, amendment, cancellation or suspension, as well.* And likewise subject to his approval are the terms, conditions and limitations of the order. 49 USCA §601. Thus, *Presidential control is not limited to a negative but is a positive and detailed control over the Board's decisions, unparalleled in the history of American administrative bodies.*" (333 U. S. at 109; emphasis supplied.)

The reasons for this complete inversion of "the usual administrative process" and for "the President's control of the ultimate decision" need not be left to inference. The hearings before the Congressional Committees on the bill which eventually became the Civil Aeronautics Act of 1938, and the debates in Congress itself, show that Congress had two principal sets of considerations in mind—*first,* the considerations of national defense and foreign relations involved in air transportation outside of the continental borders, which made it important that the President, with the special intelligence available to him, should have the ultimate decision, and, *second,* the President's constitutional powers as Commander-in-Chief and as the nation's organ in foreign affairs, which made it doubtful that Congress *could* deprive him of final authority in this

field.* Both these factors were noted in this Court's opinion in the *Waterman* case, *supra,* at pp. 108, 109-110.

Section 801 was adopted to accomplish these broad purposes. Congress neither intended nor understood that the President was authorized to act only upon affirmative orders of the Board, as petitioners contend. Rather it was intended and understood that Section 801 gives the President authority over "any action" of the Board with respect to certificates and foreign air carrier permits. This is made clear by the report of the House Committee on Interstate and Foreign Commerce on H. R. 9738 of the 75th Congress, the bill in which Section 801 originally appeared (H. R. Rep. 2254, 75th Congress, p. 11). This report described Section 801 in the following terms:

> "Section 801: The President of the United States:—This section provides that *any action* of the Authority *with respect to* a permit authorizing a foreign air carrier to operate to this country, or a *certificate* authorizing an American air carrier to operate in overseas or foreign air transportation or between places in the same Territory or possession, shall be subject to the approval of the President." (Emphasis supplied.)

Petitioners' argument rests primarily on what the Court below called "a meticulously literal reading of the first sentence of Section 801" (R. 99). They contend that since Section 801 subjects to the approval of the President the "issuance" and the "denial" of a certificate, the failure of Section 801 expressly to refer to a

* Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Congress, 3rd session, 1938, on H.R. 1938, pp. 37-40, 136, 146-148, 408-411; 83 Cong. Rec. 8653, 8654.

"refusal to transfer" a certificate excludes such an order from the President's authority. Their argument is that in order to give the President the power over negative as well as affirmative proposals of the Civil Aeronautics Board which the legislative history shows it desired, Congress would have had to word Section 801 in some such way as "the issuance or denial, transfer or refusal to transfer, amendment or refusal to amend, cancellation or refusal to cancel, suspension or refusal to suspend, or revocation or refusal to revoke" etc.

Courts do not require Congress to draw statutes in this manner. They give effect to the basic intent. *Church of the Holy Trinity* v. *United States*, 143 U. S. 457 (1892); *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 542-544 (1940); *Johnson* v. *United States*, 163 Fed. 30, 32 (1st Cir. 1908), per Holmes, J.

Moreover, petitioners' microscopic method of statutory construction runs into immediate difficulty in the second sentence of Section 801. That sentence, quoted above (p. 17), clearly required the *application* for the transfer of AOA's certificate to Pan American to be transmitted to the President "before hearing thereon." Petitioners do not dispute this. In the Court of Appeals they conceded also that the requirement that "all decisions thereon" be *submitted* to the President "before publication thereof" applies to decisions denying proposed transfers of international certificates as well as to decisions granting them, although they argued that in the former situation this was merely as a courtesy (Brief in support of Petition to Stay, pp. 21-22). Confronted by the logic of Judge Swan's observation that "This [submission] would seem purposeless unless he [the President] had power to approve or disapprove the Board's decision" (R. 100), petitioners changed their ground and now con-

tend (Brief, p. 22) that a Board decision denying a transfer application is not required to be sent to the President at all. This contention, however, flies in the face of the language "all decisions *thereon*," *i.e.*, on "*all applications in respect of*" international, overseas and territorial certificates and permits, "shall be submitted to the President before publication thereof." A denial of a transfer application is as much a "decision thereon" as a granting of it. Why then, as Judge Swan said, bother the President by submitting such a decision to him if he has no power to act? Congress did not mean simply to increase the President's reading-matter.

The niggling construction of the powers of the President under Section 801 urged by petitioners cannot, of course, be limited to "transfer." As noted by the Court below (R. 100):

> "If the denial of a transfer is not subject to Presidential approval, the same must be true of the denial of an amendment, cancellation, suspension or revocation of a certificate."

With respect to all these actions, petitioners are forced to contend that the President's power under Section 801 covers only a portion of the territory, and that portion, as we shall now show, bounded in a whimsical manner unrelated to the need for Presidential supervision. An interpretation leading to such a result would defy the rule repeatedly laid down by this Court that "all laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose." *United States* v. *Katz*, 271 U. S. 354, 357 (1926). *United States* v. *American Trucking Associations,*

Inc., supra; Armstrong Paint & Varnish Works v. *Nu-Enamel Corp.*, 305 U. S. 315, 332-33 (1938).

Take, first, a case in which an American-flag carrier applies for suspension or cancellation of a certificate to operate to a foreign country. The Board, acting on purely economic grounds and on pleas of users as to the detrimental effect of discontinuance of the service upon them, proposes to deny the application. The President, however, has information from "available intelligence services whose reports are not and ought not to be published to the world" (333 U. S. at 111) that the aircraft and personnel involved may be subject to serious hazard, giving rise to a possible international incident. This would seem precisely the type of case where Congress would have wanted the President to be the ultimate arbiter. Petitioners say, however, that the President would be completely powerless to overrule the Board—although he admittedly could have either prevented or insisted upon the service when it came before the Board initially.

Petitioners recognize the need to supply some rationale for the results to which their construction inevitably leads. They seek to do this by a theory that Section 801 comes into play only when the Board is proposing something new, involving "serious issues of foreign policy" and requiring "further diplomatic implementation" (Brief, pp. 19-20), but not when the Board is simply insisting on continuation of the *status quo*.

Petitioners' theory does not square with the realities. As shown by the case just put, serious diplomatic consequences can ensue from refusing to change a situation just as well as from making a change. Another case in which this would be even more clear would be where the Board refused to sanction the transfer, not of a "certificate," the form of license issued to an American-flag car-

rier, but of a "permit," the form of license issued to a foreign-flag carrier. Frequently, an application for transfer of a permit would be made with the approval or, indeed, even at the behest of the foreign government whose citizens were involved.* Granting such an application would hardly involve the United States in diplomatic difficulties, yet this admittedly is subject to Presidential approval. Suppose, however, that the Board should propose to deny such a transfer application on the ground, for example, that other activities of the proposed transferee would make its competition with our own carriers more severe than that of the transferor. Here is a clear case where the diplomatic problem would arise from the *denial* of the application and Presidential intervention might be necessary to prevent difficulties in our international relations. Yet, on petitioners' construction of Section 801, the President would be powerless.

Another fallacy in petitioners' rationale is its failure to take account of the military as well as diplomatic reasons underlying the grant of power to the President in Section 801. This is demonstrated not only by the considerations referred to above (p. 22) but by the fact that Section 801 applies to operations between the continental United States and the Territories, and even within a territory, to precisely the same extent as to operations between the United States and foreign countries. While, as we have shown, petitioners' assumption that failure to change the *status quo* cannot have *diplomatic* consequences is wholly unrealistic, they can scarcely even urge this in the military field. In this very case the President may well have been of the view that the national defense would be better

* See *Airways (Atlantic) Limited, Permit to Foreign Carrier*, 2 C.A.B. 181 (1940), where the permit transfer was sought in pursuance of an Act of Parliament reorganizing British civil aviation.

served if American-flag air operations to areas in which the national security is so vitally at stake were confided to two stronger rather than to three weaker hands.

Our discussion thus far has been concerned with transfers, suspensions and cancellations. But the absurd results that would flow from petitioners' whittled-down construction of Section 801 is clearest of all in the case of "amendment". Petitioners concede, of course, that Section 801 gives the President overriding powers in one instance of Board refusal to alter the *status quo,* namely, denial of an application for *issuance* of a certificate. Yet their construction forces them to say that the President has no such overriding power where the Board denies an application for *amendment* of a certificate already issued, although as pointed out by the Court below (R. 100):

> "The same delicate issues of foreign policy which make it desirable for the President to review a decision with respect to granting amendment of a certificate may be present in a decision to deny amendment. It would be in the highest degree formalistic for a court to say that the President may review one and not the other."

Just how "formalistic" will become even plainer when the Court realizes that it is largely accidental whether a new international or overseas or territorial air service is granted as a new certificate or as an amendment to an existing certificate.

Northwest Airlines, Inc., et al., Pacific Case, 7 C.A.B. 209 (1946), will illustrate the point. Hawaiian Airlines, which operated a service among the Hawaiian Islands and which had previously applied for (but had not received) a certificate between Hawaii and the United States, applied for a *certificate* between Hawaii and Tokyo. Pan Ameri-

can, which already held a certificate between the continental United States, Hawaii and Hongkong, applied for an *amendment* of its certificate to include, among other things, this identical Hawaii-Tokyo operation. On petitioners' construction, when the Board granted Pan American's application and denied Hawaiian's, the President could have vetoed the Board's action *granting* Pan American's *amendment* application and could have directed the Board to reverse its action *denying* Hawaiian's *certificate* application. On the other hand, if the Board had *granted* Hawaiian's *certificate* application and had *denied* Pan American's *amendment* application, while the President could have vetoed the former, he would have been powerless, if he believed that Pan American could furnish the service to the country's greater advantage, to bring that result about by disapproving the *denial* of Pan American's *amendment* application. Yet he could have accomplished this result if only Pan American had applied, as it could have done, for a *new* certificate between Hawaii and Tokyo and not merely for an *amendment* of its existing certificate between the continental United States, Hawaii and Hongkong.

Surely it is not to be supposed that Congress intended the great powers which it desired to confer upon the President by Section 801 to be dependent upon procedural niceties of this character.

Petitioners' attempt to escape from this dilemma leads them into an even deeper morass. They argue (Brief, p. 21) that sometimes an amendment is not really an amendment, even though stated to be such; it is really an application for a new certificate. Any such distinction would be impossible to administer since in each case where the carrier had called its application an amendment and the Board had recommended against it, either the Board or the President,

or both, would have to make a collateral determination whether what the carrier called an amendment was an amendment within the meaning of Section 801 or merely an ill-baptized application for a new certificate, and presumably this determination would be subject to judicial review. Is this determination to depend on the number of miles involved? On whether another country is involved? Or is it to be wholly subjective? What of the fact that an "amendment" to a certificate normally confers rights different from an additional certificate, namely, the right to conduct air transportation directly between points on either side of the junction? Do petitioners say that such an amendment may convey all the added rights and privileges ordinarily pertaining to an "amendment", and yet, if sufficiently extensive, not constitute an "amendment" for purposes of Section 801? The fact that petitioners' construction forces them to urge distinctions such as these affords sure proof of the correctness of the reading given to the statute by the Court of Appeals and by all others who have been concerned with it.

The Board has regularly submitted denials of applications for amendments to the President and the President has acted on them in precisely the same way as applications for new certificates. It is true that in many of these cases both kinds of applications were consolidated for hearing—further illustration of the impracticability of drawing any distinction between them—and they were dealt with in one order; but if petitioners' construction were correct, the Board should have segregated the denial of the amendments and not made these subject to Presidential approval. Moreover, there have been at least two important cases in which the denial of an amendment was dealt with separately by the President. *Continental Airlines, Inc. et al., Texas Air Service,* 4 C.A.B. 478

(1943); *Pacific Northwest-Hawaii Service* case, 9 C.A.B. 414, 580 (1948).

Against this settled administrative practice, petitioners rely on a single case, *Acquisition of Cordova Air Service, Inc. by Alaska Airlines, Inc.*, 4 C.A.B. 708 (1944), in which the Board denied an application for the transfer of a certificate for intra-territorial air service and apparently did not transmit its order to the President for approval. This is all too slender a reed to sustain the burden which petitioners place upon it. Failure to obtain Presidential approval of this decision may merely reflect an inadvertent omission by employees of the Board. Certainly the Board made no *ruling* that the decision did not have to be sent to the President. As noted above, the second sentence of Section 801 expressly requires such a decision to be submitted to the President before the decision could be published, and if it was not so submitted, the Board acted improperly.

Finally, as bearing on the proper interpretation of Section 801, is the fact that throughout the long and bitterly contested administrative proceeding in this case, all parties clearly understood that, whether the Board's recommendation was affirmative or negative, final decision would lie with the President. This view was expressed time and again from the beginning of the proceeding to its end, with no question as to its correctness raised by petitioners or anyone else. Indeed, the attorney of record for petitioners in this Court, who represented another party in the proceeding before the Board, concluded his brief with the statement "* * * the Board should *recommend* that the proposed acquisition of AOA by Pan American be disapproved." (RB 9306; emphasis supplied.) This was an entirely proper recognition of the plain meaning of Section 801, as this had always been